United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

273

THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24,917

UNITED STATES OF AMERICA,

Appellee

v.

NATHANIEL E. RAMSEY

Defendant - Appellant.

Appeal from Judgment of the United States
District Court for the District
of Columbia
(D.C. Criminal No. 1959-69)

BRIEF OF APPELLANT NATHANIEL E. RAMSEY "IN FORMA PAUPERIS"

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April 9, 1971

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,917

UNITED STATES OF AMERICA,

Appellee

v.

NATHANIEL E. RAMSEY

Defendant - Appellant.

BRIEF OF APPELLANT NATHANIEL E. RAMSEY "IN FORMA PAUPERIS"

Defendamt-appellant, Nathaniel E. Ramsey, appeals from judgment of conviction of attempted robbery entered on December 4, 1970, by the United States District Court for the District of Columbia (Youngdahl, J.)

The judgment of the District Court

a) upon a jury's verdict convicted defendant of attempted robbery; and

b) sentenced him to eight to twenty-four months in prison.

Preliminary Statement

This appeal raises important issues concerning the proper administration of federal criminal justice in this Circuit. It is respectfully submitted that

the trial in the District Court represents a prejudicial departure from the fundamental rules under our system of criminal justice in that:

a) the indictment and the charge which the jury was directed to consider were neither the ones which the Grand Jury had returned nor were they necessarily included in those that were returned;

b) defendant Ramsey was denied his constitutional right to due process and a fair trial as a result of the Court's actions with respect to these charges.

The Issues on Appeal[1/]

The issues presented by this appeal are the following:

I.

Whether the trial court erred when it amended the indictment during the trial and submitted a charge on a separate and distinct offense to the Jury.

II.

Whether the trial court erred in failing to declare a mistrial after dismissing the assault charges from the indictment.

1/ This case now pending has not previously been before this Court.

Statement of the Case

The Indictment

The indictment in this case was returned by the Grand Jury on December 16, 1969. As noted, the indictment contained three counts and named two defendants.

The Grand Jury charged defendant-appellant Nathaniel E. Ramsey and defendant Joe Dixon, Jr. with violations of 22 D.C. Code 501, 3202, 502 on three separate counts as follows:

> (First) while armed with a dangerous weapon, that is, a knife, feloniously and willfully assaulted Elizabeth Baucum, by force and violence and against resistance and by putting in fear, with intent to steal and take valuable goods and property from the person and from the immediate actual possession of the said Elizabeth Baucum.
>
> (Second) feloniously and willfully assaulted Elizabeth Baucum, by force and violence and against resistance and by putting in fear, with intent to steal and take valuable goods and property from the person and from the immediate actual possession of the said Elizabeth Baucum.
>
> (Third) assaulted Elizabeth Baucum with a dangerous weapon, that is, a knife.

Thus, from the face of each count of the indictment, it is apparent that the cornerstone of all of the Grand Jury's charges was assault, not just simple assault, but assault perpetrated with the exclusive

intent to commit robbery.

These were not, as defendant-appellant shall show, the charges submitted to the trial jury by Judge Youngdahl.

The Trial

The Court read to the entire jury panel each assault charge verbatim from the Grand Jury's indictment (Tr. 3-4). As noted, these charges were assault with intent to commit robbery while armed, assault with intent to commit robbery, and assault with a dangerous weapon, and together with their alleged factual premise, they were again repeated and discussed by the Government in its opening statement to the jury (Tr. 26-28). The Government's case consisted of testimony of the complaining witness, Mrs. Baucum, and the arresting officer, Mr. Brady, and Government Exhibit No. 1, a knife belonging to defendant which the Government alleged was the instrument of the assault (Tr. 28-66).

At the close of the Government's case, defense counsel moved for a directed verdict of acquittal (Tr. 66). After discussion, the motion was in essence denied with the Court deciding:

> " ... to instruct the jury when the jury is brought back that the Court has granted motion [of acquittal] partially to the extent it has eliminated three counts completely and eliminated the charge of assault

> from the first two counts and will submit the case to the jury on the first count of attempted robbery while armed with a dangerous weapon and under the second count of attempted robbery." (Tr. 99)

At that point (Tr. 99-100) the Government produced a retyped, altered two count indictment charging (1) attempted robbery while armed with a dangerous weapon and (2) attempted robbery. Over the repeated objection of defense counsel, the Court told the jury that it had concluded as insufficient to submit to the jury the three counts asserted in the Grand Jury's indictment but would submit just two counts, the "lesser included offenses" of attempted robbery while armed with a dangerous weapon and attempted robbery. (Tr. 102-3).

Although the Court indicated to counsel that it would do so, it did not specifically instruct the jury that this retyped indictment was an alteration of the Grand Jury's indictment under the instructions of the Court and to pay no attention to the true bill language on the bottom of the new indictment. From the record it is not certain which of the two written indictments, if any, were actually sent in with the jury.

After the opening statements of defense counsel (Tr. 103-106), defendant-appellant Ramsey and defendant Dixon took the stand in their own behalf. At the close

defendants' case, the Motion for direct verdict of acquittal was renewed and again denied (Tr. 129).

Prior to the closing arguments, the Court suddenly informed counsel, apparently out of hearing of the jury, that he had reconsidered the matter and was now

> "only going to submit attempted robbery. I previously told you I was submitting two offenses, I have now concluded to submit for your consideration in this case whether or not the Government has proved beyond a reasonable doubt these defendants, one of these defendants is guilty of attempted robbery" (Tr. 130).

The sole charge submitted to the jury and on which they received instruction by the court was that of attempted robbery, a charge which was not contained in the indictment of the Grand Jury (Tr. 147-60). The jury returned the verdict of guilty of attempted robbery as to both defendants (Tr. 162).

ARGUMENT

I.

THE COURT ERRED WHEN IT AMENDED THE INDICTMENT DURING TRIAL AND SUBMITTED A SEPARATE AND DISTINCT CHARGE TO THE JURY

> The Court's attention is directed to (1) the following pages of the trial transcript (Tr. 3-28, 66-103, 129-30, 147-60) and (2) the indictments.

In ruling on defense motions for acquittal, the trial judge ordered the charges of assault to be striken from the charges brought by the Grand Jury because of failure of proof by the Government.

The trial judge refused, however, to completely dismiss counts 1 and 2, although the assault charge was the cornerstone, indeed the gravamen of those counts (Tr. 66, 99-103).

As a result of this legal ruling of the Court, a retyped, altered indictment containing charges on two separate and distinct offenses was drawn up by the Government and endorsed by the Court who instructed the Jury on the amendment (Tr. 99-103). Immediately prior to closing arguments, the court decided not to submit to the jury any charge on count one, but again refused to completely dismiss count two (Tr. 130). Consequently, defendant-appellant was tried and ultimately convicted on a charge of the Court and not a charge of the Grand Jury.

Although the Court characterized its alteration of the charges as the submission of "lesser included offenses" (Tr. 102), appellant respectfully submits that (1) attempted robbery is not an offense necessarily included in an indictment charging assault with intent to commit robbery, and (2) that the Court's rulings thereon violated the defendant's rights under

the Fifth Amendment to be tried on the charge of the Grand Jury.

A. ATTEMPTED ROBBERY IS A SEPARATE AND DISTINCT OFFENSE, NOT A LESSER OFFENSE NECESSARILY INCLUDED IN THE OFFENSE OF ASSAULT WITH INTENT TO COMMIT ROBBERY

The trial court concluded that there is absolutely "[no] difference between intent to commit robbery and attempted robbery" (Tr. 96), that "intent to commit robbery is synonymous with attempted robbery" (Tr. 97, 98), and that the latter is therefore a "lesser included offense" of the former.

Defendant-appellant submits that this pronouncement by the trial court is without the support of case law, legislative history and plain logic.

Although it is true that no cases in this Court have squarely answered this precise question,[2/]

[2/] Compare Pope v. Huff, 73 U.S. App. D.C. 170, 79 U.S. App. D.C. 18, 117 F.2d 779, 141 F.2d 727 (1944), where in two separate habeas corpus proceedings appellant unsuccessfully urged that his acquittal of assault with intent to rob also required his acquittal of attempted robbery in order to avoid double jeopardy. The case is significant, however, only in that the defendant was separately indicted for assault with intent to rob and attempted robbery. Thus if it has any application here, it is support for the proposition that these two offenses are separate and distinct and that attempted robbery is not a lesser included offense of assault with intent to commit robbery.

this Court has construed Rule 31(c) of the Federal Rules of Criminal Procedure[3/] to mean "for a lesser offense to be 'necessarily included' in the offense charged it 'must be such that the greater offense cannot be committed without also committing the lesser'". Kelly v. United States, 125 U.S. App. D.C. 205, 206, 370 F.2d 229, 230 (1966), cert. denied 388 U.S. 913; Crosby v. United States, 119 U.S. App. D. C. 244, 245, 339 F.2d 743, 744 (1964). "The standard is usually applied by ascertaining whether all of the elements of the lesser offense, i.e., the elements to be required to be established to constitute the offense, are also elements of the greater offense". Kelly v. United States, Ibid.

The charge in each count of the Grand Jury's indictment centered on assault, an element not present in and specifically removed from the charge of attempted

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3/ Rule 31(c) of the Federal Rules of Criminal Procedure provides:

> "Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

robbery which was the sole offense considered by the jury. On the other hand, attempted robbery requires as additional elements the commission of an act reasonably adapted to the commission of robbery, and which goes beyond mere preparation and carries the project forward to within dangerous proximity of the actual robbery. These elements are not elements of the offense of assault with intent to commit robbery. Hence two different crimes are involved.

Although there may be an assault with intent to commit robbery with every robbery or attempted robbery, the converse is not true. Therefore, if anything, assault with intent to commit robbery is a lesser included offense of attempted robbery.

Furthermore, and perhaps more fundamentally, the gravamen of each count in the indictment returned by the Grand Jury is assault. It is assault committed by one <u>who at the time of the perpetration of the assault acts with the specific intent to commit robbery</u> upon the complainant. Thus, if the assault charge is removed from the three count indictment brought by the Grand Jury, those offenses are literally gutted and rendered legally insufficient since there are no elements including the appropriate intent which are independent and survive the elimination

of the assault. At the most, one is left with mere intent to commit robbery, a mental state which is not in itself a statutory or a common law crime and which as previously explained, does not embrace every element of the offense of attempted robbery.

It is important not to lose sight of the fact that what is controlling here is the offense charged in the indictment, not an offense established by the trial proof.

Since a person cannot be found guilty of attempted robbery without some additional act beyond and in addition to the mere intent to commit robbery, the Crosby test establishes that assault with intent to commit robbery and attempt to commit robbery are separate offenses with the latter, therefore, not necessarily included within the former.

It was, therefore, an error to submit a count of attempted robbery to the jury in a case where that crime was neither a charge for which defendant was indicted nor one which could be charged as a lesser included offense. See Fuller v. United States, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968).

Further, due process of law requires that an accused be advised of the charges against him prior to trial in order to permit him to develop his defense.

See, e.g., In re Oliver, 333 U.S. 257, 273 (1948). Since attempted robbery was not a charge brought by the Grand Jury and is not a lesser included offense,[4] its introduction by the government in the middle of defendant-appellant's trial denied him adequate notice and due process of law guaranteed by the constitution.

The trial court's conclusion that intent to commit robbery is synonymous with attempted robbery and that the latter is a lesser included offense is unfortunately another example of perpetration of injustice by the mechanical application of a formulary doctrine designed to accomplish justice.[5]

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[4] Courts have long presumed that a charge of a crime would afford the defendant sufficient notice to defend against any lesser included offense. This presumption is inherent in Rule 31(c) of the Federal Rules of Criminal Procedure. See Kelly v. United States, supra; Walker v. United States, 135 U.S. App. D.C. 280, 418 F.2d 1116 (1969). Since attempted robbery is not a lesser included offense, defendant at the commencement of his trial was at the very least entitled to consider that if he could gainsay the pivotal element of assault in each of the offenses charged in the indictment, this would suffice for his acquittal.

[5] For an extensive discussion of the intended functions and defects of the included offense doctrine in California, see 10 UCLA L. Rev. 870 (1963).

B. THE COURT'S ACTION CONSTITUTED A VIOLATION OF DEFENDANT RAMSEY'S CONSTITUTIONAL RIGHT TO BE TRIED ON THE CHARGE OF A GRAND JURY -- NOT ON AN INDICTMENT AS AMENDED BY THE COURT.

The controlling principle, rooted in the Bill of Rights, was firmly established in Ex Parte Bain, 121 U. S. 1 (1886) where the Supreme Court held that it was an impermissible violation of a defendant's constitutional rights for the trial court to amend an indictment. In Bain, defendant was indicted for:

> "Making false statements and report ... with intent to deceive the comptroller of the Currency and the agent appointed to examine the affairs of said association ... "

The Supreme Court held that the action of the trial court in striking as surplusage the words "the Comptroller of the Currency" unconstitutionally deprived defendant of his Fifth Amendment right to be tried on the charge of the grand jury. The Court wrote (121 U. S. at 5-6):

> "The proposition that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action

> in other courts, we are at once confronted with the fifth of those articles of amendment, adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that 'no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury,' except in a class of cases of which this is not one."

After examining the common law precedents, the Court concluded that, even at common law, there was no authority which sustained the right of a court to amend any part of an indictment.

The Court said (121 U.S. at 9-10):

> "The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute required to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this

> indictment, who was satisfied that the false report was made to deceive the Comptroller but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indicement which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attached to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

The statute under which defendant was convicted in Bain made it an essential element of the offense that the false report be made with intent to deceive the agent appointed to examine the affairs of the national banking association. Thus, the addition of the words "Comptroller of the Currency" was not essential to sustain the legal sufficiency of the indictment. But another statute required national banking associations, not less than five times a year, to make reports to the Comptroller of the Currency. The Supreme Court found it "not impossible nor very improbable" that some of the grand jurors may have looked on the Comptroller as the person defendant intended to deceive, even though the indictment also

charged, and the trial jury found, that the agent had been deceived. Once the charge of deception of the Comptroller was removed from the case, there was no way of knowing whether the grand jury would have indicted for intent to deceive the agent.

Accordingly, although at first glance, the action of the trial court appeared to be beneficial to defendant by narrowing the charge against him, there was an additional factor to be considered --the possibility that the grand jury would not have indicted if the charge of intent to deceive the Comptroller was not before them.

The same basic considerations apply with even more force here. The grand jury's charges, as is apparent from the face of the indictment, all proceeded from the premise that there was an assault upon the complaining witness, and that the assault was done <u>with</u> the intention to commit robbery. Having been advised by the prosecutor that defendant-appellant was guilty of assault it would seem to follow that the grand jury also concluded that the defendant had done so with the intent to steal and take the money from the complaining witness.

As it turned out, however, the grand jury's

fundamental premise, that defendant had "assaulted" complainant was erroneous. (Tr. 99-103, 130). This error was the fault of the prosecution who obviously advised the grand jurors that there was sufficient evidence to charge assault with intent to commit robbery. It was, as the trial court itself suggested, not an unavoidable error by the prosecution. (Tr. 68, 86)

> "You mean to tell me that you asked the grand jury for an indictment and came to ask the court to try a case where there is a very close question you don't research to substantiate that this is an assault? This isn't an ordinary assault case. In any case I have had in twenty years I haven't had one like this." (Tr. 68)

The risk was taken, appellant submits, because the government must have felt that its case of intent to rob would be substantially stronger if it could supply an assault as the overt act toward consumption.

It is not possible, nor is it defendant-appellant's burden, to establish what the grand jury would have done if it had not been advised that defendant-appellant's conduct was an assault. Only a mindreader can tell that; but it is precisely for this reason that Bain required the complete dismissal of the amended conspiracy count.

Here, as in Bain, it is not "impossible nor very improbable" that the grand jury or at least some of the grand jurors looked upon the assault as the cornerstone of all remaining portions of counts one, two and three. With the assault charge removed, there is no way of knowing whether the grand jury would have found an attempted robbery, accordingly all counts of the indictment should have been dismissed or a mistrial declared.

The rule of Bain is part of our fundamental constitutional law, and has been followed in numerous other cases both in the Supreme Court and in this and other circuit courts of appeals. See e.g., Stirone v. United States, 361 U.S. 212 (1960); Russell v. United States, 369 U.S. 749 (1962); Crosby v. United States, 339 F 2d 743, (D.C. Cir. (1964).

In Russell, supra at 770 the Court noted that

> "The settled rule in the federal courts [is] that an indictment may not be amended except by resubmission to the grand jury, unless the charge is merely a matter of form."

In the case at bar, the elimination of the assault charges from the indictment cannot by any stretch of imagination be considered one of form only.

This amendment went to the very gravamen of each of the counts which the grand jury indicted defendant-appellant on since Congress created "assault with intent to commit robbery" and "attempted robbery" as separate and distinct crimes. 22 D.C. Code 501 & 2902.

More importantly, it cannot be said that such elimination was not a matter which possibly could have influenced the grand jury's decision to indict; and it is this precise point which distinguishes this case from those cases which have held that not every change in an indictment after it has been returned by the grand jury is an impermissible amendment. Such cases do not detract from the Bain principle and are not in point here.

Appellant has a constitutional right to be charged by a grand jury for the precise offense for which he is tried and convicted.

Since the offense of attempted robbery is not necessarily included in an indictment charging assault with intent to commit robbery, the trial court effected on impermissible amendment thereto and consequently lacked jurisdiction to convict appellant of that offense under the indictment returned by the grand jury.

"To hold otherwise would in effect be to allow judicial amendment of the grand jury indictment; this cannot be accomplished even with a defendant's consent." (Citing Ex Parte Bain, supra) Crosby v. United States, 119 U.S. App. D.C. 244, 339 F 2d 743, 744 (1964).

II.

THE COURT FAILURE TO DECLARE A MISTRIAL AFTER DISMISSING THE ASSAULT CHARGES FROM THE INDICTMENT DENIED DEFENDANT-APPELLANT A FAIR TRIAL

(Tr. 3-5, 26-28, 37-41, 102-103, 111-114)

The trial court is obligated to safeguard defendant's procedural rights guaranteed by the Constitution and to protect him from prejudice. Having erronously refused to grant defendant's motions for a directed verdict, the Court at the very least was obligated to declare a mistrial once it determined to dismiss the assault charges from the indictment.

From the moment the jury was first read the grand jury indictment, its attention was focused on the fact that this was a case of assault.* It was repeatedly shown a two-bladed knife, admittedly owned by defendant, as the instrument of the assault. Two reductions/alterations in the charges by the court occurred thereafter.

*Tr. 3-5, 26-28, 37-41, 111-114, 118

At the close of the government's case the court, after lengthy discussion with counsel out of the jury's presence, told the jury that it had "concluded as insufficient to submit to the jury the offenses" contained in the indictment, but that since there was enough evidence it would submit under the first and second counts to the jury the lesser included offenses of Attempted Robbery with a Dangerous Weapon and Attempted Robbery. (Tr. 102-103) After closing arguments, the court suddenly told the jury that the case was being submitted only on one charge, the offense of Attempted Robbery, rather than on either of the three counts alleged in the indictment. (Tr. 130, 153-154)

Despite the court's explanation[6/] (Tr. 103, 150, 153-154) there is a sufficient possibility that the ultimate impression left with the jury was that the charges on which the defendant had been indicted were finally reduced to the one

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6/ On the general ineffectiveness of cautionary instructions, see Krulewitch v. United States, 336 U.S. 440, 453 (1949), concurring opinion of Mr. Justice Jackson.

charge on which the defendant must have been guilty. Since the likelihood of the jury's making such an improper inference is a very real one, the court should have presumed prejudice and declared a mistrial.

Its failure to do so preserved and encouraged the climate for such an improper inference and effectively deprived defendant-appellant of his right to a fair trial.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the conviction of defendant-appellant Ramsey should be reversed.

Respectfully submitted,

Ronald A. Capone

Attorney for Defendant-Appellant Nathaniel E. Ramsey, Appointed by this Court

Dated: April 9, 1971

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,817

UNITED STATES OF AMERICA, APPELLEE

v.

NATHANIEL RAMSEY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JAMES L. LYONS,
WILLIAM H. SCHWEITZER,
Assistant United States Attorneys.

Cr. No. 1959-69

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether attempted robbery is a lesser included offense of assault with intent to commit robbery?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,917

UNITED STATES OF AMERICA, APPELLEE

v.

NATHANIEL RAMSEY, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed December 16, 1969, appellant[1] was charged with assault with intent to commit robbery while armed, assault with intent to commit robbery, and assault with a deadly weapon, in violation of 22 D.C. Code §§ 3202, 501 and 502, respectively. His trial was held before the Honorable Luther W. Youngdahl and a jury on September 9, 10 and 11, 1970. Motions for judgment of acquittal were granted as to the charges

[1] Appellant was tried with a co-defendant, Joe Dixon, Jr., who did not appeal from his conviction.

set forth in the indictment,[2] and attempted robbery was submitted to the jury as a lesser included offense of assault with intent to commit robbery. Appellant was found guilty of attempted robbery and on December 4, 1970, was sentenced to imprisonment for a term of eight to twenty-four months. This appeal followed.

The Government's Case

At approximately eight o'clock in the morning of October 3, 1969, Mrs. Elizabeth Baucum, a co-owner of the A & E Restaurant,[3] was serving food to an unusually small number of customers (Tr. 28-30, 53). She was working by herself when appellant and his co-defendant, Joe Dixon, Jr., entered the restaurant (Tr. 30, 32). Appellant and Dixon went to the juke box and danced for a couple of minutes while listening to the music (Tr. 33, 54-56).[4] The two men then seated themselves on the stools at the counter, and appellant ordered a sandwich (Tr. 34-35, 56-57). Mrs. Baucum, who was standing behind the counter, made the sandwich and gave it to appellant (Tr. 34-35, 56-57). He pushed the sandwich over to Dixon, and Dixon said to him, "Man, you haven't got the joint yet, knock the joint off and let's go" (Tr. 36, 57). Appellant had arisen from the stool and asked Mrs. Baucum about the amount of money in the cash register (Tr. 37). She replied that there was very little money in the register, but nevertheless appellant said,

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[2] The trial court partially granted a motion for judgment of acquittal as to the three counts in the indictment at the close of the government's case (Tr. 102-103) and instructed the jury that the lesser included offenses of attempted robbery while armed and attempted robbery would be submitted to the jury (Tr. 103). At the conclusion of all the evidence, the trial court granted appellant's motion as to the lesser included offense of robbery while armed (Tr. 130).

[3] The A & E Restaurant is located at 1426 North Capitol Street (Tr. 62).

[4] Appellant spoke with another customer, William Adams, while he was listening to the music (Tr. 33-34). The record is unclear as to when Mr. Adams left the restaurant (Tr. 48).

"This is a hold-up" (Tr. 37). Mrs. Baucum told appellant to "help himself" to the money in the register (Tr. 37, 49). She noticed that he had his hand in his pants pocket, and appellant threatened her by saying, "This doesn't miss" (Tr. 37).

Almost immediately a number[5] of uniformed police officers came into the restaurant (Tr. 38, 49). As they entered, appellant took his hand out of his pocket (Tr. 38).[6] He was holding a knife with an open blade which he slid across the counter, causing it to fall to the floor behind the counter (Tr. 38-39, 43-44, 48-49, 52). Mrs. Baucum retrieved the knife and placed it under a dish towel (Tr. 39, 44, 52), then gave it to Officer Bradley when he arrived with the other plainclothes officers moments later (Tr. 39, 63-64).

The Defense

Appellant testified in his own behalf.[7] He stated that he had gotten out of bed at 5:30 a.m. and had consumed a half-pint of liquor by the time he arrived at the A & E Restaurant (Tr. 107, 115). He had met Mr. Dixon a half-hour earlier (Tr. 108, 115).[8] The two men seated themselves at the counter, and appellant ordered half-smokes and coffee for himself and Dixon (Tr. 108-109,

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[5] Officer Bennie J. Bradley, who was assigned to the Robbery Branch of the Metropolitan Police, testified that there were three uniformed officers in the restaurant when he arrived between 8:00 and 8:15 a.m. (Tr. 62, 65).

[6] Mrs. Baucum testified that she did not observe any bulge in appellant's pocket prior to the robbery attempt and observed a knife for the first time when he removed it from his pocket as the police officers came through the door (Tr. 45-47).

[7] The co-defendant Dixon also took the stand.

[8] Appellant met Dixon at 9th and U Streets, Northwest. Appellant intended to lay concrete that day and was looking for two men to help him. Appellant and Dixon went to the A & E Restaurant to wait for a third man who was going to take them to the job (Tr. 108-109).

115-116).[9] They talked for about twenty minutes while eating their breakfast (Tr. 109-110). The general thrust of the conversation concerned the number of robberies that had occurred in the area (Tr. 109, 116). Appellant pointed out a High's store across the street which had been robbed so often that it went out of business (Tr. 109).

About twenty minutes after appellant and Dixon had entered, two police officers came into the restaurant. They walked around the dining area and then asked Mrs. Baucum what was going on (Tr. 110-111). One of the policemen[10] said that he knew appellant and asked him, "Where is your gun?" (Tr. 112). It was at this time that appellant took his pocket knife from his shirt pocket and pushed it over the counter (Tr. 112-114). Mrs. Baucum picked up the knife, placed it on the stand used for preparing sandwiches and covered it with a towel (Tr. 112). The knife was closed when appellant took it out of his pocket and dropped it behind the counter (Tr. 114). Appellant was afraid that if the police searched him for a gun, they would find the knife in his possession (Tr. 114). Appellant denied attempting to rob Mrs. Baucum or threatening her with his knife (Tr. 112-113, 117-119).

ARGUMENT

Appellant was validly convicted of attempted robbery.

(Tr. 3-162)

Appellant's principal argument is directed at the fact that he was convicted of an offense for which he was not specifically indicted. In his view, attempted robbery is

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[9] Appellant tesitfied that upon entering the restaurant he walked to the juke box (Tr. 116) and spoke briefly to a man who was standing nearby (Tr. 107-108, 116). However, the man had gone by the time the first policeman arrived (Tr. 109).

[10] Appellant referred at one point in his testimony to two officers and two police cars (Tr. 110) and later mentioned that three officers searched the restaurant (Tr. 112).

not a lesser included offense of assault with intent to commit robbery, and therefore the charge of attempted robbery resulted from an amendment to the indictment and should not have been submitted to the jury.[11]

The doctrine of lesser included offenses has undergone various changes in this jurisdiction.[12] The basic test is set out in *Kelly* v. *United States*, 125 U.S. App. D.C. 205, 370 F.2d 227 (1966), *cert. denied*, 388 U.S. 913 (1967):

> For a lesser included offense to be necessarily included in the offense charged it must be such that the greater offense cannot be committed without also committing the lesser. *Crosby* v. *United States*, 119 U.S. App. D.C. 244, 245, 339 F.2d 743, 744 (1964). The standard is usually applied by ascertaining whether all the elements of the lesser offense, *i.e.*, the elements required to be established to constitute the offense, are also elements of the greater offense.[13]

Exceptions to the strict *Kelly-Crosby* test have been created by this Court in certain circumstances. In *Fuller* v. *United States*, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968) *(en banc)*, *cert. denied*, 393 U.S. 1120 (1969), second-degree murder was held to be a lesser included offense of felony murder despite the fact that second-degree murder requires proof of malice, which is not an element of felony murder.[14] Unlawful entry has been

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[11] *See Ex parte Bain*, 121 U.S. 1 (1887).

[12] The doctrine is codified in Rule 31 (c), FED. R. CRIM. P., which provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

[13] The court in *Kelly* pointed out that the original reason for development of the doctrine was to aid the prosecution when it failed to prove one element of the greater offense.

[14] The court in *Fuller*, *supra*, 132 U.S. App. D.C. at 293, 407 F.2d at 1228, stated that at common law felony murders were committed with malice on a theory of transferred intent. However, the Court

held to be a lesser included offense of first-degree burglary where the evidence was sufficient to support a finding of guilt of unlawful entry, even though the indictment as to first-degree burglary was imprecisely drawn. *United States* v. *Thomas*, D.C. Cir. No. 23,975, decided April 26, 1971. The Court in *Thomas* held that the defendant was given sufficient notice in the invalid indictment [15] that he would have to defend against a charge of unlawful entry and could be convicted of that charge as a lesser included offense even though there was technically no longer an indictment. *See also United States* v. *Seegers*, D.C. Cir. No. 23,621, decided April 26, 1971. Finally, in *United States* v. *Whitaker*, *supra* note 14, the Court recognized that unlawful entry was not a lesser included offense of first-degree burglary in the strict *Kelly-Crosby* sense. The *Whitaker* Court held, however, that if a defendant was put on notice by the indictment that he would have to defend against an unlawful entry charge and the evidence supported a finding of guilt as to unlawful entry and acquittal as to first-degree burglary,[16] then the defendant's request for a lesser included offense instruction should be granted.

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further stated that although malice may be transferred, second-degree murder was in any event a lesser included offense of felony murder because the defendant was put on notice by the indictment for felony murder that he would have to defend against an intentional killing. *See United States* v. *Whitaker*, D.C. Cir. No. 23,185, decided May 26, 1971, slip op. at 6-8 n.11; *Jackson* v. *United States*, 114 U.S. App. D.C. 181, 313 F.2d 572 (1962).

[15] The indictment in *Thomas* was held to be invalid because it did not allege the specific offense or offenses which the defendant intended to commit once he entered the dwelling.

[16] The evidence must support a possible finding of guilt by the jury as to the lesser included offense. *Sparf* v. *United States*, 156 U.S. 51 (1895); *United States* v. *Sinclair*, D.C. Cir. No. 23,178, decided March 31, 1971; *United States* v. *Comer*, 137 U.S. App. D.C. 214, 421 F.2d 1149 (1970); *Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967). There must be a dispute as to the facts so that the jury can rationally find the defendant guilty of all the elements of the lesser crime and not guilty of the disputed element or elements of the greater offense. *Sansone* v. *United States*, 380 U.S. 343 (1965); *Unitd States* v. *Whitaker*, *supra* note 14.

We submit that attempted robbery is a lesser included offense of assault with intent to commit robbery in keeping with both the classic *Kelly-Crosby* guidelines and the *Whitaker* interpretation of those guidelines. The government requested that attempted robbery be submitted to the jury as a lesser included offense (Tr. 75-76). The elements of assault with intent to commit robbery are an unlawful assault and at the time of the assault a specific intent to rob. *Young* v. *United States*, 109 U.S. App. D.C. 414, 288 F.2d 398 (1961), *cert. denied*, 372 U.S. 919 (1963); *see Braswell* v. *United States*, 135 U.S. App. D.C. 128, 417 F.2d 545 (1969). The elements of attempted robbery are that the defendant committed an act which was reasonably adapted to the commission of the offense of robbery; that the act went beyond mere preparation and carried the project forward to within dangerous proximity of the criminal end sought to be attained; and that, at the time the act was committed, the defendant acted with specific intent to commit the offense of robbery.[17] An attempted robbery can be committed without commiting an assault, *Pope* v. *Huff*, 79 U.S. App. D.C. 18, 141 F.2d 727 (1944), but every assault with intent to commit robbery must contain an attempted robbery. Both offenses contain the element of the specific intent to commit a robbery, and the offense of assault with intent to commit robbery must by definition contain the completed assault. Attempted robbery must go beyond mere preparation but may fall short of the completed assault.[18] *Pope* v. *Huff*, *supra*.

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[17] *See* JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 106 (1966).

[18] Appellant's argument that assault with intent to commit robbery is a lesser included offense of attempted robbery is clearly incorrect. Under *Kelly* and *Crosby* it is clear that for a lesser offense to be necessarily included in the greater offense, the greater offense must be such that it *cannot be committed* without committing the lesser offense. Every assault with intent to commit robbery must contain an attempted robbery. If the attempted robbery goes beyond mere preparation and reaches the point at which an assault

The instant case presents an example of an act which goes beyond mere preparation but falls short of an assault. Appellant had the specific intent to rob Mrs. Baucum when he arose from the stool and stated, "This is a hold-up" (Tr. 37). This act went beyond mere preparation, for he put his hand in his pocket and said, "This doesn't miss" (Tr. 37). However, the intrusion of the police officers caused the attempt to fall short of an assault, and therefore there was no offense of assault with intent to commit robbery.

In *United States* v. *Whitaker*, *supra*, the Court relaxed somewhat the stringent standards of *Kelly* and *Crosby* in considering whether or not a *defendant* should be entitled to an instruction on a lesser included offense. The Court in *Whitaker* initially recited five conditions which have heretofore been required to be met before a lesser included offense instruction could be given [19] and then carved out exceptions to two of the five requirements. One, that involving the concept of "mutuality," is not involved here, inasmuch as it traditionally applies only to situations in which a convicted defendant assigns as error the trial court's refusal to give a requested lesser included offense instruction. The other exception created by the *Whitaker* Court has to do with the rule

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is committed, then the offense of assault with intent to commit robbery has been consummated. However, the act which goes beyond mere preparation may fall short of an assault, but there may still be an attempted robbery. *Pope* v. *Huff*, *supra*.

[19] "First, as with most other charges, a proper request must be made. Second, the elements of the lesser offense must be identical to part of the element of the greater offense . . . . Third, there must be some evidence which would justify conviction of the lesser offense. Fourth, the proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense. Fifth, 'in general the chargeability of lesser included offenses rests on a principle of mutuality that, if proper, a charge may be demanded by either the prosecution or defense.'" *United States* v. *Whitaker*, *supra*, slip op. at 5, quoting from *Fuller* v. *United States*, *supra*, 132 U.S. App. D.C. at 295, 407 F.2d at 1230 (footnotes omitted).

that "the elements of the lesser offense must be identical to part of the elements of the greater offense . . . ." Slip op. at 5. The Court modified that rule by holding that a lesser included offense instruction should be given, upon request,

> when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. *Whitaker*, *supra*, slip op. at 8 (footnote omitted).

The *Whitaker* opinion, of course, speaks only in terms of entitlement to a lesser included offense instruction when it is requested by the defense. It is, however, implicit in *Whitaker*, slip op. at 13, and explicit in *United States* v. *Thomas*, *supra*, that if the indictment gave notice to the defendant that he would have to defend against the lesser included offense and the evidence supported a finding of guilt as to the lesser charge, then the prosecution would also be entitled to the instruction. In the instant case, appellant was put on notice by the indictment that he would have to defend against attempted robbery, and the evidence supported a finding of guilt of attempted robbery. Thus, we submit, the instruction on attempted robbery as a lesser included offense was properly given, and appellant was properly found guilty of attempted robbery, not only under the *Kelly-Crosby* test but also under the more recently developed principles of *Whitaker* and *Thomas*.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.[20]

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JOHN A. TERRY,
JAMES L. LYONS,
WILLIAM H. SCHWEITZER,
Assistant United States Attorneys.

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[20] Appellant's contention that the court amended the indictment is without basis. The record clearly shows that there was no amendment to the indictment as set out in *Ex parte Bain, supra.* The court considered submitting to the jury a retyped indictment containing the proposed lesser included offenses (Tr. 99-103), since the court had granted motions for judgment of acquittal as to the original three offenses. However, appellant's counsel objected to sending the retyped indictment in to the jury (Tr. 101) and there is no indication in the record that the indictment was in fact retyped. In addition, the court, at the conclusion of the defense case and prior to closing argument (Tr. 130), granted a motion for judgment of acquittal as to the lesser included offense of attempted robbery while armed.

Moreover, even if a retyped indictment had been sent to the jury, there would have been no error, for the retyped indictment was neither intended nor regarded as a new pleading but merely as a recitation of the lesser included offense which flowed from the charges in the original indictment, which of course still retained its validity. *See* 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 127 (1969).

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THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24,917

UNITED STATES OF AMERICA,

Appellee

v.

NATHANIEL E. RAMSEY,

Defendant - Appellant

Appeal from Judgment of the United States
District Court for the District
of Columbia
(D.C. Criminal No. 1959-69)

REPLY BRIEF OF APPELLANT NATHANIEL E. RAMSEY "IN FORMA PAUPERIS"

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Appellant
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296-4911

Of Counsel:
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July 6, 1971

TABLE OF CASES

CASES:

THE UNITED STATES COURT OF APPEALS
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No. 24,917

UNITED STATES OF AMERICA,

Appellee

v.

NATHANIEL E. RAMSEY

Defendant - Appellant.

REPLY BRIEF OF APPELLANT NATHANIEL E. RAMSEY
"IN FORMA PAUPERIS"

Defendant-Appellant, Nathaniel E. Ramsey, herewith replies to the Brief filed by Appellee and for the reasons recited here and in its Opening Brief asks this Court to find that the Court below erred by amending the indictment during trial and submitted the separate and distinct charge of attempted robbery to the jury.

Appellee urges that every assault with intent to commit robbery must contain an attempted robbery and that, therefore, attempted robbery is a lesser included offense of assault with intent to commit robbery.

As Appellant discussed in its Opening Brief, this Court has held that for the prosecution to be entitled to a lesser included offense charge, one of the conditions which must be met is that the elements of the lesser offense must be

identical[1] to part of the elements of the greater offense. Appellee's bare conclusion cannot overcome the fact that the elements of attempted robbery are simply not "identical," comparable or "inherently related" to either the assault or intent to rob elements of the separate and distinct offense of assault with the intent to commit robbery.[2]

None of the recent cases cited by Appellee establishes or requires the legal conclusion that it would urge upon this Court. Rather, it seems Appellee argues that because this Court has in certain "particular circumstances" found second degree murder to be a lesser included offense of felony murder[3] and unlawful entry to be a lesser included offense of first degree burglary,[4] it must now hold that the offense of attempted robbery is identical to the element of "intent to commit robbery" and, therefore, a lesser included offense of assault with intent to commit robbery.

1/ Kelly v. United States, 129 U.S. App. D.C. 205, 370 F.2d 229 (1966); Crosby v. United States, 119 U.S. App. D.C. 244, 339 F. 2d 743 (1964). Compare United States v. Whitaker, D.C. Cir. No. 23,185 decided May 26, 1971.

2/ See Pope v. Huff, 73 U.S. App. D.C. 170, 79 U.S. App. D.C. 18, 117 F.2d 779, 141 F.2d 727 (1944).

3/ Fuller v. United States, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968), cert. denied, 393 U.S. 1120 : (1969).

4/ United States v. Thomas, D.C. Cir. 23, 975 (Decided April 26 1971), United States v. Seegers, D.C. Cir. 23, 621 (Decided April 26, 1971; United States v. Whitaker, D.C. Cir. 23, 185 (Decided May 26, 1971).

A careful comparison of the procedural and factual circumstances of the Thomas, Seegers, and Whitaker cases with the record in this appeal dissolves the conclusory inferences and applications which Appellee seeks to draw from these cases.

In the Thomas and Seegers cases, this Court found indictments as drawn by the Grand Jury to be defective to charge the offense of First Degree burglary. In Whitaker as well as Thomas and Seegers, it was the Defendant-Appellant who sought and was refused an instruction on unlawful entry as a lesser included offense of first degree burglary. In the present case, it was the prosecution not Appellant who sought an instruction on attempted robbery as a lesser included offense.[5/] Moreover, Appellant here does not assert that the indictment drawn by the Grand Jury was defective, rather his complaint lies with the improper amendment of that indictment by the Court and the Prosecution, and the failure of the court to grant his motion for a directed verdict and dismissal of all counts.

Also, it is not insignificant that in both the Thomas and Whitaker cases, this Court found that the evidence supported the finding of an unlawful entry which is the pivotal element of the offense of first degree burglary. This Court neither

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5/ This Court has distinguished between the satisfaction of conditions necessary for the instruction on lesser included offenses on the basis of whether it is the Defendant or the prosecution that is seeking the instruction. "The defense sought not to be restricted by the stringent constitutional limits upon the Prosecutors right." See, e.g., United States v. Whitaker, supra, at pp. 13.

said nor inferred, however, that without the viability of the element of unlawful entry that the trial court could have properly submitted to the Jury the charge of attempted burglary as a lesser included offense of "intent to commit a specific criminal offense therein".

Appellee ignores that the very gravamen of each count of the indictment returned by the Grand Jury was ASSAULT. It was assault allegedly committed by one, who at the time of the perpetration of the assault, acts with the specific intent to commit robbery upon the complainant. Thus, once the assault charge was removed from the three-count indictment brought by the Grand Jury, those offenses are rendered legally insufficient since there are no elements, including the appropriate intent, which are independant and survive the non-existence of the assault element. At most, one is left with the mere element of "intent to commit robbery", a mental state which is not in itself a statutory or common law crime and which even if it was, does not embrace identical of or even comparable elements to the offense of attempted robbery.

Appellee not only contends that the element of "intent to commit robbery" is identical and inherently related to the elements of the offense of attempted robbery but also urges that Appellant was put on notice by the indictment that he would have to defend against attempted robbery.

The fact of the matter is that the record demonstrates a

situation quite to the contrary which rebuts any such assertion. How could appellant be found to be on notice of such a possibility from the state of the law, when as his Opening Brief demonstrated, existing case law, statutory law and plain logic do not require such a conclusion. To the contrary, Defendant-Appellant was entitled to consider that if he could gainstay the pivotal element of assault in each of the offenses charged in the Grand Jury's indictment, this would suffice for his acquittal. Further, the fact that from the middle to the end of the trial Appellant vigorously resisted the common effort of the Government and the Court to abandon all counts of an indictment that pivoted on "assault" by substituting a new charge of attempted robbery.

Despite the fact that the prosecution urged and the Court below concluded that the evidence was sufficient to establish an attempted robbery, the fact remains there is no way of knowing whether (1) the Grand Jury would have independently charged an attempted robbery if they were advised that the element of assault was incapable of factual support, or (2) the ultimate impression left with the jury by the Court's handling of the charges was that the charges on which the defendant had been indicted were finally reduced to the one charge on which the defendant must be guilty.

In the circumstances present in the case now before this Court, to permit the conviction of Appellant to stand would be to allow a situation where defendant is deprived of a fair trial

and the Grand Jury is usurped in its constitutional function by the prosecuting attorney and the trial judge. Ex Parte Bain, 121 U.S. 1 (1887).

> "The very purpose of a requirement that a man be indicted by a Grand Jury is to limit his jeopardy to offenses charged by his fellow citizens acting independently of either prosecuting attorney or Judge." Stirone v. United States, 361 U.S. 212, 218 (1960).

Conclusion

For the reasons stated above, and in Appellant's Opening Brief, it is respectfully submitted that the conviction of Defendant-Appellant Ramsey should be reversed.

Respectfully submitted,

Ronald A. Capone

Attorney for Defendant-Appellant, Nathaniel E. Ramsey, Appointed by This Court.

Dated: July 6, 1971